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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

8 ROBERT MITKA,

9 Petitioner,

10 v.

11 ICE FIELD OFFICE DIRECTOR,

12 Respondent.

CASE NO. C19-193-MJP-BAT

**ORDER DIRECTING PARTIES TO  
FILE SUPPLEMENTAL BRIEFS**

13 Robert Mitka, who is currently represented by counsel, brings this 28 U.S.C. § 2241  
14 habeas action to challenge his prolonged immigration detention and obtain release or a bond  
15 hearing. He has been detained since May 1, 2018, and an immigration judge (“IJ”) found that  
16 she did not have jurisdiction to release him on bond. An IJ also denied his application for  
17 asylum, and his appeal of that decision is currently pending. U.S. Immigration and Customs  
18 Enforcement is scheduled to conduct a custody review on July 7, 2019, and may consider him for  
19 release at that time.

20 The Government has moved to dismiss, arguing that Mr. Mitka entered the United States  
21 under the Visa Waiver Program, and therefore (a) he is lawfully detained under the statute  
22 establishing that program, 8 U.S.C. § 1187, (b) the immigration court does not have jurisdiction  
23 to consider his request for a bond hearing under *Matter of A-W-*, 25 I. & N. Dec. 45 (BIA 2009),

1 and (c) the BIA's decision in *A-W-* should be afforded *Chevron* deference. Mr. Mitka's response  
2 brief did not address the Government's arguments and instead asserted that his detention of more  
3 than a year without a bond hearing violates his due process rights.

4 These are all issues of first impression in this District and, it appears, the Ninth Circuit.  
5 District courts addressing similar issues have reached different results. Some have held that a  
6 habeas petitioner in Mr. Mitka's situation is detained under 8 U.S.C. § 1226(a) and entitled to a  
7 bond hearing pursuant to that statute. *E.g.*, *Gjergi G. v. Edwards*, No. 19-5059, 2019 WL  
8 1254561 (D.N.J. Mar. 18, 2019); *Emila N. v. Ahrendt*, No. 19-5060, 2019 WL 1123227 (D.N.J.  
9 Mar. 12, 2019). Others have declined to decide the statutory basis for the petitioner's detention  
10 and directly addressed the constitutional question. *E.g.*, *Bacuku v. Aviles*, No. 15-2543, 2016  
11 WL 818894 (D.N.J. Mar. 2, 2016).<sup>1</sup>

12 "It is a fundamental principle that a court, presented with both statutory and constitutional  
13 grounds to support the relief requested, usually should pass on the statutory claim before  
14 considering the constitutional question." *Shannon v. U.S. Civil Serv. Comm.*, 621 F.2d 1030,  
15 1031 (9th Cir. 1980) (per curiam). In light of this principle and the above authority resolving  
16 analogous cases without addressing constitutional claims, the Court concludes that it must  
17 determine the statutory basis for Mr. Mitka's detention prior to addressing due process claim.  
18 Given that Mr. Mitka did not address the statutory basis for his detention in his briefing, the  
19 Court will direct him to file a supplemental response and provide the Government with an  
20 opportunity to file a supplemental reply.

21 Based on the foregoing, the Court **ORDERS:**

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<sup>1</sup> These are not the only approaches courts have taken to this issue but are the most relevant for the purposes of this order.

1 (1) Mr. Mitka shall file a supplemental response brief by **July 10, 2019**, that  
2 addresses, at a minimum, the statutory basis for his detention. Mr. Mitka also should inform the  
3 Court of the outcome of his July 7, 2019 custody review.

4 (2) The Government may file a supplemental reply brief by **July 15, 2019**.

5 (3) The Clerk is directed to **RE-NOTE** the Government's motion to dismiss, Dkt. 9,  
6 for July 15, 2019, and to send copies of this order to the parties and the assigned District Judge.

7 DATED this 27th day of June, 2019.\_

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10 BRIAN A. TSUCHIDA  
Chief United States Magistrate Judge